Law vol. 20.

AN

ACCOUNT

OF THE

ARGUMENTS OF COUNSEL

WITH

THE OPINIONS AT LARGE

OF THE HONOURABLE

Mr. Juſtice GOULD, Mr. Juſtice ASHHURST,

AND

Mr. Baron HOTHAM.

Upon the QUESTION at the Seſſion at the OLD-BAILEY,

On SATURDAY the 16th of SEPTEMBER, 1775,

WHETHER

Margaret Caroline Rudd ought to be tried.

By JOSEPH GURNEY.

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G.R. III.

PREFACE.

THE following Publication treats upon a ſubject of the utmoſt importance to ſociety. It is extremely remarkable, that although the adminiſtration of Juſtice, under the criminal juriſdiction of this country, is ſo materially affected by this article of the law, we do not find it conſidered with preciſion, or laid down with authority by any writer whatſoever. Indeed the late difference of opinion which prevailed amongſt the learned and experienced Judges, who preſided during the laſt Seſſions at the Old-Bailey, ſufficiently demonſtrates the neceſſity of an inquiry into the nature and effect of admitting a perſon to become, what is vulgarly termed King's Evidence.

That its cauſes, and its conſequences, ſhould be communicated to mankind, and that, in a ſtile intelligible to the loweſt rank of people, muſt be obvious to every one. On the one hand, diſcoveries neceſſary to the detection of crimes, and to the conviction of offenders, frequently depend entirely upon this practice; and on the other, the ſafety of the life of the diſcoverer is derived from that aſ-

ſiſtance which he lends to the laws of his country, for the furtherance, and attainment of juſtice.

From what the learned Judges have ſaid upon the ſubject, it will appear, that the common law doctrine of Approvers, is now obſolete. It was founded upon principles, and regulated by a proceſs totally inconſiſtent with the Religion and Laws of this country, as they are now reformed, and explained. The attempts the Legiſlature has made from time to time, to induce diſcoveries, and effect convictions, have likewiſe proved to a degree ineffectual, becauſe, though under certain circumſtances, they hold forth protection to the accomplice; there are very few perſons, and very few caſes, to which the ſeveral proviſions of theſe Statutes are found to extend.

The ground then upon which an accomplice is admitted "King's Evidence," and the benefit to be derived to him from the diſcloſure he makes, at this time of day, depends upon the conſtruction and extent of that diſcretionary power which is hourly exerciſed by the Magiſtrates in every part of the kingdom, of which experience proves the utility, and to which practice gives the ſanction.

That the Magiſtrates may be appriſed upon what principles they are empowered, and under what circumſtances they

they will be warranted, and in what degree they are enabled to afford indemnity to an accomplice, ſhould no longer remain a matter of uncertainty. And the Criminal himſelf ought to be thoroughly acquainted with the purpoſes for, and the means by which, he, although guilty, is to eſcape with impunity.

A Publication therefore upon this ſubject, can alone deſerve attention when it is free from prejudice, and confirmed by authority.

The diſcuſſion of the topic by a writer merely, however learned or ingenious, would be ſuſpected of partiality to a particular caſe or perſon, and therefore would afford no ſanction for general practice, or future conduct.

To diſcloſe to the world, and particularly to Magiſtrates, what is the law, and what ought to be the practice, the Editor communicates to the public at large, he flatters himſelf with the greateſt accuracy, what the learned Judges delivered, as their reſpective opinions upon Mrs. Rudd's caſe.

The arguments of Counſel are reported in ſubſtance only, it being not neceſſary to ſtate more than the general heads of what was alledged on each ſide of the queſtion.

The Printer of the Trials at the Old-Bailey having ſubjoined to the Seſſions Paper, what he calls, " An Account of the Proceedings at the laſt Seſſions relative to Mrs. Rudd," I think it neceſſary to declare, as well to prevent an impoſition on the public, as to reſcue my own character from reproach, that I was not in the leaſt concerned in giving the account alluded to, which, upon peruſal, I find to be exceedingly defective, and in many places groſsly erroneous.

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ACCOUNT

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ARGUMENTS OF COUNSEL, &c.

Margaret Caroline Rudd being ſet to the Bar,

MR. Davenport and Mr. Cowper, of Counſel for the Priſoner, ſubmitted to the Court, that ſhe ought not, under the circumſtances in which ſhe ſtood, to be put upon her trial for the ſeveral forgeries laid to her charge. They inſiſted, that having been, together with two other Priſoners, Robert and Daniel Perreau, examined before the Magiſtrates, touching a Bond of Mr. William Adair's, ſuppoſed to be forged, and uttered to Mr. Drummond, that the ſame Magiſtrates propoſed to her, to become an evidence for the Crown; that after having been ſixteen times before the Magiſtrates, and it having been told to her, that if ſhe diſcloſed what ſhe knew concerning the charge againſt the ſeveral Priſoners, ſuch diſcloſure, when given in evidence by her, would afford protection to herſelf; that ſhe, Mrs. Rudd, thus ſituated and thus informed, conſented to

become King's Evidence, and to give her teſtimony in the proſecution of Daniel and Robert Perreau; that accordingly the Juſtices, after examinations ſo frequently repeated, and upon diſcretion maturely exerciſed, did, as far as by law they might, admit Mrs. Rudd to be an Evidence for the Crown; that in conſequence of this admiſſion, ſhe ſubmitted to be examined upon oath touching the ſuppoſed forged bond, was ſworn to that examination, and was enlarged upon entering into her own recognizance to appear and give evidence at the Old Bailey againſt Robert and Daniel Perreau. Upon theſe facts, they contended that Mrs. Rudd ought not now to be tried. They ſaid, that they did not mean to impeach, or preſume to arraign the opinion of the Court of King's-Bench, by which ſhe was denied to be admitted to bail; that in point of law; ſhe was not ſtrictly entitled to be releaſed upon giving bail; that the Court had unqueſtionably a diſcretionary power, to admit or refuſe the object of that application, but that the refuſal of that motion would not now prevent the preſent Court from extending to Mrs. Rudd any advantage ſhe might be entitled to in her preſent ſituation.

They further obſerved, that correſpondent to the opinion of the Court, they did not mean to argue on the behalf of Mrs. Rudd, that ſhe was in the ſituation of, or in ſtrictneſs of law, entitled to the kind of protection which at the common law was given to an Approver; nor did they mean to ſay ſhe came within the letter of any of thoſe ſtatutes which relate to the admiſſion of Accomplices as witneſſes; but they urged, that her objections to being tried, were bottomed upon that good faith which ought to be obſerved between the Magiſtrates and a Priſoner, the daily, general, and neceſſary practice of all the Criminal Courts, and the honour and delicacy by which thoſe Courts ever govern themſelves in the treatment of criminals, or accuſed perſons. That this practice is part of, or at leaſt evidence of the law

law of the land, drawn from the old common law of Approvers, and other proviſions of the ſtatutes, not immediately in terms agreeable to either, but ſupplying as far as might be the deficiency and omiſſions of both. That the practice was general, they ſaid, could not be controverted; that it was neceſſary, every Magiſtrate converſant in buſineſs would readily allow. That its exiſtence for the future, depended entirely upon the Magiſtrate being ſupported in the exerciſe of that diſcretionary authority, which had never yet been denied to have been veſted in the Magiſtrate, or defeated in the conſequences it ought to produce to the criminal. They further inſiſted, that whether the Juſtices had or had not acted agreeable to the rules of law, whether they had or had not conducted themſelves judiciouſly, in the choice of the perſons to be admitted evidence for the Crown, the Priſoner ſo admitted was not to be prejudiced by the ignorance or error of the Magiſtrate. That as between a proſecution and a priſoner, the honour of the adminiſtration of juſtice would always interpoſe, and confirm to the accuſed the benefits promiſed by any perſons acting under the ſuppoſed authority of the law; that it did not appear the Juſtices had done wrong, and that there was every reaſon to preſume they had done right. That no perſon could ſuppoſe the Magiſtrates who had acted in the preſent caſe, were capable of being influenced by improper inducements, and that it would be equally abſurd to ſay, that the experience and ſagacity, by which they are ſo eminently diſtinguiſhed, could in this inſtance be egregiouſly impoſed upon. They alledged, that the only queſtions to be aſked upon the preſent occaſion were, whether Mrs. Rudd had ever been admitted as an evidence, ever had the conſequential protection on the one hand in her own contemplation, and on the other in promiſe from the Juſtice; whether ſhe had acted in conformity to the obligations impoſed upon her by the receiving her as Evidence for the Crown, or diveſted herſelf of every

title to indemnity, protection or mercy, by forbearing to fulfil the conditions upon which they were extended to her.

As to the firſt, the examination upon oath proves it; as to the ſecond, ſhe was told by the Juſtices, and appriſed by her then Counſel, that ſhe might ſave herſelf by it. But, ſaid they, it will be alledged, that the ſtory ſhe has told contains no charge againſt herſelf, that it does not contain the whole truth, and that the preſent proſecutions before the Court, are for different offences. As to the firſt objection, if it contains no charge againſt herſelf, it does againſt Daniel Perreau, and conviction of another offender is the only purpoſe for which an Accomplice is ſpared. It was not neceſſary to charge herſelf—ſhe was charged, was a Priſoner, and then admitted as a witneſs. But whether the ſtory ſhe told was true or falſe, abſurd or credible, worthy or undeſerving the attention of the Juſtices, yet it was the ſtory ſhe told, and upon that ſtory the Juſtices exerciſed their diſcretion. But further, the ſtory here remains uncontradicted, and no one can preſume it to be falſe. The preſumption is in favour of the Priſoner, that it is true; conſider the ſituation of the Priſoner, and the probability as well as the preſumption is that ſhe told truth. She is one of theſe perſons brought before the Juſtices, charged with a capital offence; ſhe is examined over and over again, is appriſed of her ſituation, and the danger which threatens her life, is told upon what terms ſhe may redeem herſelf; but at the ſame time is appriſed, if ſhe does not tell ſhe whole truth, the will defeat the end for which ſhe is admitted as an evidence, and loſe the advantages which ſhe was to derive from being ſo: can it be preſumed then, that ſhe in this ſituation concealed ſomething, the ſuppreſſion of which would anſwer no other purpoſe, but to take away her own life? But ſhe anſwered fully to all ſhe knew, and to all that ſhe was examined to. Had ſhe been examined to the other bonds, can any perſon pretend

to

to ſay, whether ſhe is ignorant of them or not; or if concerned in them, whether ſhe would have owned it or not. Suppoſing ſhe is privy to the forging or publiſhing theſe other bonds, it might not occur to her, that it was neceſſary for her to anſwer to more than ſhe was examined to. Is her miſapprehenſion of the law in that caſe to affect her life, when even the Juſtices with all their knowledge and diſcernment are by ſome ſaid to have been miſtaken in their conduct? As for the preſent proſecution being upon different bonds, that will not preclude the Priſoner from the protection ſhe hopes for. The ſuppoſed forgeries are all between the ſame parties, are different parts only of one great ſcene of fraud; are inſeparably connected with the bond, to which ſhe was examined, upon which ſhe was ſworn before the Grand Jury, to which ſhe was ready to give evidence in this Court, and upon which the Perreaus have been convicted. Can any perſon ſay ſhe told falſehoods to the Grand Jury? Can any perſon ſay ſhe would have concealed or prevaricated had ſhe been examined? Will any perſon believe, that had the proſecutors upon the tryal of the unhappy brothers, found it neceſſary to the conviction of thoſe offenders to produce Mrs. Rudd, that for the promotion of the great ends of juſtice, they would not have called her as a witneſs? She attended as a witneſs upon her own recognizance; ſat four days in my Lord Mayor's parlour, ready to diſcharge the obligations on her part, ready to anſwer the purpoſes for which ſhe was admitted as a witneſs, and to diſcharge her duty, by giving evidence againſt the Perreaus. The proſecutors might have called her; it would then have been ſeen whether ſhe would have prevaricated, whether ſhe would have promoted or obſtructed the attainment of juſtice; and whether ſhe would have been entitled to protection or not, would have appeared to the Court from the moſt certain information, her own deportment. Is ſhe then to be prejudiced becauſe the proſecutors upon the tryal found they could do without her? But what is the

 reſult

reſult of her readineſs?—She comes as a witneſs, under the faith of the Juſtices, under the compulſion of a Subpœna, under her recognizance to appear as a witneſs; and is called in—for what? Not to be examined, but to be put from one bar as an Evidence, to the other as a Culprit.

Had ſhe been called and ſworn, who can pretend to ſay ſhe would have concealed any fact, or ſuppreſſed the truth in any circumſtance? Indeed, had ſhe been produced, and had groſsly prevaricated, miſrepreſented facts, and had defeated inſtead of furthering the conviction, ſhe would have forfeited all right to the protection ſhe now claims; it would have been a breach of the condition upon which ſhe is entitled to it, and it would, on her part, have been an abandonment of that confidential relationſhip which had ſubſiſted between her and the Juſtices. But no one, without aſſuming a ſpirit of prophecy, can ſay, ſuch would have been her conduct. But further, can any perſon bring himſelf to think, that theſe charges bear no relation to one another? Perhaps the Court will tell the Jury, they ought not to be prejudiced by any thing the Priſoner has ſaid upon one bond, when ſhe ſtands upon her tryal, charged with a forgery of another; but is it poſſible for the human mind to diſmiſs from its recollection, all that has been heard upon the ſubject, and in forming a judgment, to ſeparate with nicety and preciſion ſuch information as is founded in legal evidence, from that which has been ſo repeatedly diſcloſed upon this examination. And if Mrs. Rudd has in confidence of this hoped for protection uttered one word that may turn to her prejudice, ſuch is the honour and delicacy of the Courts of Criminal Juſtice, that ſhe will not be put into a ſituation, in which ſhe may ſo materially ſuffer from that confidence? Upon the whole, they ſubmitted that for the ſake of the practice, neceſſary in itſelf, general in uſe, and approved by the concurrent approbation of Judges in daily experience,

and for the ſake of others, who acting upon the ſame principles may find themſelves in the ſame ſituation with Mrs. Rudd, ſhe ought not now to be put upon her tryal for any of the forgeries, all relating to the ſame tranſaction, and all being antecedent to that for which the Perreaus had been proſecuted, and upon which ſhe had been admitted as an Evidence for the Crown.

Mr. Bearcroft, Mr. Lucas, and Mr. Howarth, of Counſel for the Crown, began with obſerving, that they were not aware that any ſuch motion as the preſent was intended to be made on the behalf of the Priſoner. They obſerved, that they did not mean by that, to arraign the propriety of the application to the Court, becauſe it was certainly the duty of Counſel for a Priſoner capitally charged, to make every objection that there was the leaſt colour for making, though they apprehended that the grounds of the motion made by the Priſoner's Counſel would not bear the teſt of an examination. That the Counſel for the Priſoner had very properly allowed, that the preſent application was not grounded upon any law, or any ſtatute, but that it was merely (as it certainly is) in the diſcretion of the Court; for if it was a caſe at law, or upon an Act of Parliament, the Counſel for the Priſoner, who the Counſel ſaid knew very well what courſe to have followed, would certainly have reduced it into the form of a plea. That it is not a caſe within the rule of the common law, becauſe there the party muſt be indicted, and till he has confeſſed that indictment, he cannot be admitted an Approver; and there have been many inſtances where that indictment has hung over the head of the Approver, and where ſuch an Approver has not diſcloſed the whole truth to the ſatisfaction of the Jury, he can be called down to judgment upon his confeſſion; that the queſtion of diſcretion went to the mode and manner of the trial, and the Court would undoubtedly take care that nothing that had been done by the Juſtices where they have

have exceeded their authority, ſhall turn to the prejudice of the Priſoner.

That whenever an accomplice is according to the vulgar phraſe admitted King's Evidence by the Juſtices of the Peace (who in ſtrictneſs of law have no ſuch power) if he gives his evidence fairly upon the trial of his accomplices, diſcloſes all he knows, and does all he can to aſſiſt public Juſtice; he has that ſort of merit with the public, that the Court would never ſuffer him to be tried. That it being a matter merely of diſcretion, and not being to be found in any law books, a knowledge of it was only to be attained by experience and obſervations upon the practice of the criminal Courts. That they had conceived the principle to be, that where there are more than one perſon concerned in a crime, and there was no poſſibility of getting at any of the perpetrators of it, without admitting one who equally deſerves to be puniſhed to give evidence againſt his fellow accomplices; that then, ſuch accomplice was admitted an evidence, upon the ground of neceſſity and convenience, merely for the ſake of the public; becauſe it is more fit, that one ſhould eſcape out of a number, than that a crime highly criminal ſhould be totally unpuniſhed. And that it was beſides neceſſary to intitle the accomplice to be exonerated from trial, and conſequently from puniſhment, that he ſhould give fair and full evidence, that it ſhould be evident that he is aiming at public juſtice and nothing elſe, that he ſhould have that merit without ſpot and without ſuſpicion.

The Counſel farther obſerved, that many caſes had happened in practice which ſupported this principle.

Mr. Bearcroft mentioned a caſe within his own obſervation, of an accomplice, who having been admitted an evidence by the Juſtice of the

the Peace, been examined by the Grand Jury, and who, in his evidence upon the tryal of his Accomplices, had told the ſtory of the robbery exactly as it happened, except only in one or two circumſtances in which he knew he could be confirmed by other witneſſes (and without ſuch confirmation his evidence it is well known would have no weight) it having been manifeſt to the Court, that under pretence of giving evidence for the proſecution and aſſiſting public juſtice, he was doing all he could to pervert juſtice and ſave his Accomplices ; that after the Accomplice had gone through this kind of evidence, the Jury were directed by the Court totally to diſregard every thing he had ſaid upon the ſubject, and that evidence afterwards, upon the ground of not having the merit of having told all he knew upon the buſineſs, notwithſtanding he was admitted by the Juſtices, examined afterwards by the Grand Jury, and laſtly had given his evidence in Court upon the indictment, was directed to be indicted, was tried and convicted.

They farther obſerved, that the object of enquiry before the Juſtices, was for the publication of a forged bond in the name of Mr. William Adair, for ſeven thouſand five hundred pounds, with intent to defraud the Meſſrs. Drummonds; and that it was to that, and nothing elſe whatſoever, that the preſent Priſoner gave her evidence ; that there could not therefore be a colour of objection to her being tried for any other offence.

That the indictment that the Proſecutor purpoſed to try the Priſoner upon, was for forging, and publiſhing a bond in the name of Mr. William Adair for five thouſand three hundred pounds; upon which bond Sir Thomas Frankland was defrauded of a large ſum of money, ſo that they were ſeparate bonds of different dates; they were different tranſactions, and different perſons were concerned in them;

 that

that when the forgery of the bond for ſeven thouſand five hundred pounds was diſcovered, it became public talk; every one who had a bond of Mr. William Adair's through the hands of the Perreaus, became alarmed, and numbers of them came before the Juſtice. They ſaid that it would be in proof before the Court, that this Priſoner, upon being repeatedly aſked, whether ſhe knew any thing at all of any of thoſe other bonds that were produced, ſhe as conſtantly averred in the moſt ſolemn way, that ſhe had no knowledge of any ſort or kind of any other bond; they ſaid therefore, that the Priſoner could not poſſibly lay claim to any merit in diſcloſing any thing relating to another bond.

The Counſel put the following caſe: Suppoſe two men are concerned in a highway robbery; one is admitted King's evidence, and goes a great deal farther than the preſent Priſoner has done: he is called as a witneſs, and has had the merit to aſſiſt in the conviction of the other perſon concerned with him: if it ſhould come out afterwards that this evidence was concerned in another robbery, can there be an objection againſt trying him for that crime? Still leſs would there be a ground for the objection, if the evidence ſhould be aſked, Do you know of any other robbery committed by the perſon you now turn about to accuſe, and he with the moſt ſolemn aſſeverations denies any knowledge of it? Can it be ſaid in that caſe, that that man has ſuch a ſort of merit that a Court, without any abſolute law, but only exerciſing their own diſcretion, ſhould ſay, this Priſoner ſhall not be tryed?

The Counſel alledged, that the reaſon why the Proſecutors did not call the Priſoner upon the tryal of the Perreaus, was not becauſe they did not want the aſſiſtance of her evidence, but becauſe they did not believe her, and becauſe they thought the Jury would not believe her, and ſhe would therefore have diſgraced the proſecution.

The Counſel further ſaid, that they did not mean to make uſe in the leaſt degree of the informations the Priſoner gave before the Juſtices, or any evidence that was got at in conſequence of her information, though they ſaid it was not in fact a confeſſion of any crime; for notwithſtanding ſhe charges herſelf with committing the forgery, yet at the ſame time ſhe ſays, ſhe ſigned the bond by compulſion, for that Daniel Perreau ſtood over her with a knife; and that according to the affidavit of the Juſtices, which was read in the Court of King's Bench, the expreſs condition upon which they admitted the Priſoner an evidence for the Crown, was, that ſhe ſhould make a full and true diſcloſure of all that ſhe knew in the matter; that if ſhe had complied with that condition, and had diſcloſed the whole, ſhe muſt conſequently be innocent of the charge in the indictment they meant to try; but if it ſhould turn out upon the enquiry that ſhe is guilty of the charge in that indictment, in that caſe, even ſuppoſing the Juſtices to have full power and authority to admit her an evidence, ſhe would not be intitled to any benefit by ſuch admiſſion.

Mr. JUSTICE GOULD.

THE queſtion now made before the Court is, Whether the Priſoner ought to be tried for any forgery committed before the time that ſhe was admitted as a witneſs by the Juſtices of Peace.

If I had been at the Court of Gaol Delivery when ſhe was committed by the learned Judges, and inſtructed in the buſineſs as I ſhould have been at that time, I ſhould probably have concurred in that commitment.

With reſpect to what paſſed afterwards in the Court of King's Bench, where the queſtion was a mere queſtion of diſcretion, whether the Priſoner ſhould be admitted to bail; with the various circumſtances accompanying it, and particularly with reſpect to time, the enſuing Seſſions being ſo near; I ſhould have thought myſelf moſt thoroughly warranted, to have concurred in the opinion of the learned Judges of that Court, in not admitting her to bail.

But it comes now before this Court, as a Court of Gaol Delivery, who are to determine, whether the Priſoner ought to be tried. And I think, we can receive no lights but from ſuch facts as appear in a true legal courſe before us. For in my apprehenſion, we cannot go out of thoſe facts; and therefore, the opinion that I ſhall deliver upon this occaſion, will be founded upon ſuch facts as appear judicially before this Court, from the examinations that have been returned here by the Juſtices of the Peace.

I will in the firſt place obſerve, that the Legiſlature has eſtabliſhed a correſpondence between the gentlemen in the Commiſſion of the Peace, and the Courts of Gaol Delivery; and therefore, though in this great metropolis, from the vaſt buſineſs that comes before thoſe Magiſtrates, a practice has prevailed, which I have often heard reprobated in this Court, of their contenting themſelves with taking only a verbal examination of priſoners that are before them; yet the rule of law, which is pointed out to them by Act of Parliament, is all that I ſhall ever take notice of.

In the reign of Philip and Mary, two Acts of Parliament were made; the firſt and ſecond of Philip and Mary, chapter the thirteenth, and the ſecond and third of Philip and Mary, chapter the tenth. The firſt of theſe Acts relates to perſons who being accuſed before the Magiſtrates of felony, are by them thought proper to be admitted to bail. The preamble of that Act gives an account of a moſt groſs and wanton abuſe, which Juſtices of the Peace had been guilty of: for though by law two Juſtices of Peace ought to be preſent to bail an offender, yet one would frequently do it, and ſet down the name of another. That Act of Parliament corrects this abuſe, and then enacts, that Juſtices of the Peace ſhall examine into the facts and circumſtances, and ſhall return the examinations taken by them, to the Court of Gaol Delivery.

As that Act of Parliament applied only to the caſe of felons who were to be bailed, and not to the caſe of felons who ſhould be committed, the defect was ſupplied by the ſecond Act that I have mentioned, namely, the ſecond and third of Philip and Mary, chapter the tenth. By this Act, if a priſoner be brought before a Juſtice of Peace and accuſed of felony, an authority is given the Juſtice to enquire into the facts and circumſtances of the caſe; and I own,

I think

I think it was from the truſt repoſed in Juſtices of the Peace by that Act of Parliament, that the diſcretionary practice ſince exerciſed by them did take its riſe; that being acquainted with the facts and circumſtances of the caſe, which by the direction of the Act they are to enquire into, they were from thence to judge, whether it would be of the beſt uſe to the public, to admit one or other of the Accomplices to be a witneſs. The matter ſpeaks for itſelf; it would be impoſſible that criminal juſtice could be adminiſtered in any country, without there is held forth ſome encouragement for accomplices to detect their gangs; for we know from melancholy experience, that it is impoſſible to get to the bottom of offences committed by divers perſons, without having ſome of the Accomplices admitted to impeach the reſt.

Upon a ſubject of this kind, every Judge ſhould endeavour to deliver his opinion in ſuch words, as may be underſtood by the loweſt of the populace. We ought not to deal in refinements, and in ſubtil arguments, but in ſuch clear propoſitions and ſuch intelligible terms, that it may be impoſſible for any common perſon to be under any difficulty to underſtand them.

In delivering my opinion upon this ſubject, I ſhall be under the neceſſity in the firſt place, to examine a little, as ſhortly as I can, the doctrine of *Approvers*, which has been alluded to by the Counſel.

It is moſt clear, that a man could not be an Approver, but by the permiſſion and grace of the Court, before whom he was indicted: He muſt be firſt indicted, and he muſt confeſs the felony of which he was indicted, and then he was to pray to be admitted an Approver, and that a coroner might be aſſigned, before whom he might make his appeal. It is certainly true, that in the appeal he was to conduct himſelf

himſelf with all poſſible ingenuity. The oath he took was not confined to the particular felony of which he was indicted; for he was ſworn to diſcover all treaſons or felonies which he knew: in Raſtell's Entries, title Appeal, the real oath was as entered upon record, "that he was to make diſcovery of all treaſons and felonies." But although the oath was in ſuch general terms, yet Lord Coke, in his Third Inſtitute, chapter of Approvers, ſays expreſly, that in courſe of law no approvement can be but of the offence contained in the indictment, which the felon or Approver had confeſſed; and although he might confeſs other matters, theſe only ſerved as materials to diſcover other malefactors. The appeal, as againſt them, was of no uſe, for it only ſerved as a light to diſcover other matters.

Lord Hale expreſſes himſelf to the ſame effect. According to him, it was a ſufficient performance of the oath, to make a true appeal againſt the Accomplices in the indictment of that felony or treaſon for which the Approver was himſelf indicted, as Lord Coke ſays, not only once but ſeveral times in that chapter.

There were two modes of trying the truth of the appeal, one was by a Jury, the other by battle. If the Appellee choſe the latter mode, and the Approver were vanquiſhed, he was to be executed; but if he vanquiſhed the Appellee he was entitled to his pardon, and that not as a matter of grace. His admiſſion as an Approver was in the diſcretion of the Court. The Court might have ſaid, we will not admit you to be an Approver: but when they had once admitted him, and the other party he accuſed was either vanquiſhed in battle or convicted by a verdict, if he joined iſſue to the country, in either caſe the books all concur in ſaying, that *ex merito juſtitiæ*, the Approver was entitled to his pardon. Thus ſtood the common law with regard to Approvers.

The buſineſs of the battle, which was founded in rank ſuperſtition, did as we got rid of ſuperſtition in this country become abſolutely ridiculous; and no wonder that it was got rid of; for you will carry in your memory, that a man could not claim a right to be admitted an Approver, but it was in the diſcretion of the Court whether they would admit him; and therefore, the ſame diſcretion could at once get rid of ſo abſurd a practice. Nothing could be ſo groſs, where a trial was to be by Jury, as to ſay to the witneſs, unleſs you convict this man, who has put himſelf upon trial by his country, you ſhall be executed. It was ſuch egregious nonſenſe, that it was impoſſible for Courts entruſted with a diſcretionary power to admit perſons to be Approvers, to continue the practice of admitting them; but it became neceſſary, in my apprehenſion, to ſubſtitute ſomething that was rational, and that would thoroughly anſwer the end of diſcovering offenders inſtead of this. Now let us ſee how early we find any thing of this ſort introduced.

The firſt and material authority which I meet with upon the ſubject, is in Lord Hale's Hiſtory of the Pleas of the Crown, Vol. the firſt, Folio 303. in the 15th year of King Charles the IId. (which was immediately after the Reſtoration) by advice of Keeling Chief Juſtice, Brown Juſtice, and Wilde Recorder (all of whom were very eminent Judges, and Lord Chief Juſtice Keeling had been Recorder as well as Wilde, and was a man of very great experince in the Crown law.) Perrin, who was in gaol for two robberies, confeſſed himſelf to be guilty of a burglary with Trew. He was thereupon admitted to be a witneſs againſt Trew, as to the burglary which he confeſſed; but he was not indicted for that nor for either of the robberies. In the ſame Volume, Folio 305. Lord Hale ſays, "The party that is "the witneſs is never indicted; becauſe that doth much weaken and "diſparage his teſtimony, but poſſibly not wholly take it away."

Lord Hale lays it down as a rule, that the party is *never indicted*. Now I cannot confine my idea of the expreſſion *never indicted* to mean only before the trial, but that he may be afterwards indicted. It would really be the moſt treacherous and ſhocking conſtruction that could be put upon an expreſſion. I apprehend it muſt mean, that he was not only not to be indicted before he gives his teſtimony, but alſo that he was never afterwards to be indicted, for otherwiſe he has, as I may ſay, ſuſpended Damocles's ſword over the head of the witneſs; for it would amount to ſaying, you are liable to be indicted for three felonies; you ſhall ſtand at the bar and give your evidence ſo as to convict theſe Priſoners; or elſe, what? or elſe, you ſhall be indicted afterwards. It would, in my apprehenſion, be the groſſeſt diſhonour that could be imputed to the law; and it was impoſſible, that Lord Hale, who was a man of the greateſt depth of learning in the Crown law, could ever have a conception of the kind.

When a perſon is admitted a witneſs, there is in my opinion a legal implication of a promiſe of pardon to that witneſs. I diſtinguiſh it from an actual promiſe of pardon, upon condition to give particular evidence; concerning the legality of which promiſe, and concerning the competency of a witneſs even to be admitted under ſuch a promiſe, notwithſtanding the ſolemn determination, to which I muſt ſubſcribe, at the trial of Mr. Layer; yet we know that my Lord Hale was of a different opinion, and a late very eminent Chief Juſtice did not ſcruple to affirm, that it was his opinion too. But I need not enter into a diſcuſſion of that matter, becauſe that was a promiſe of pardon upon a particular condition; and it is moreover agreed, as appears in 2 Hawkins, 234, that if a conditional promiſe be grounded upon giving particular evidence, or that the witneſs ſhould give full evidence, that the evidence of the witneſs would not be admiſſible. I do therefore infer, that the promiſe of a pardon,

which

which is implied upon the admiſſion of a perſon to be a witneſs, is of an abſolute pardon to all intents and purpoſes, and unreſtrained from any condition whatſoever.

In the preſent caſe the queſtion is, whether the Priſoner who was admitted to be a witneſs by the Juſtices of the Peace ought to be proſecuted, (not only waving, for that I find is now waved, the crime as to which ſhe was examined) for any offence of the ſame kind, that was committed by her antecedently to that admiſſion.

I have already touched upon the manner in which I conceive Juſtices of the Peace are to govern themſelves under the Acts of Parliament which have been mentioned; they have authority, which ought to be executed with integrity and fairneſs, to enquire into all the facts and circumſtances of the caſe; and upon that enquiry to form as ſound a judgment as they are capable of.

It has long been a practice for Juſtices of the Peace to admit Accomplices to be witneſſes; and it ſeems to me impracticable to introduce any other practice. Can the Judges who come to the Old-Bailey inform themſelves whether A. or B. is a fit perſon to be admitted as a witneſs? Can the judges who go Circuits, when they come to an Aſſize Town, inform themſelves of all the facts and circumſtances of a caſe, ſo as to enable them to do it? The mere ſtating of the thing ſhews that it is an utter impoſſibility. They have no time, they have no means to do it; but the Magiſtrates, to whom the original reſort is, they have an opportunity, they have full power to examine into all the facts and circumſtances; and therefore, if it be neceſſary for the public good, that Accomplices ſhould be admitted witneſſes, the power of admitting them muſt be exerciſed by Juſtices of the Peace; it being impoſſible that it ſhould be exerciſed by others.

Conſider how long an interval there may be between the Aſſizes or between the Seſſions at the Old-Bailey, and the commiſſion of a crime. If we are to wait till the coming of the Judges to an Aſſize, or till the Seſſions at the Old-Bailey, long after the commiſſion of a crime, what would become of the gang of malefactors in the mean time? The very nature of the thing points out, that the Juſtices of the Peace are to receive the information of the Accomplice when he is before them. If they find that by admitting a perſon to be a witneſs, they ſhall be able to make an uſeful diſcovery, and break up a large gang, they ought to act *inſtanter*, in order to ſecure at once the accuſed perſons, and thereby prevent their eſcaping. It ſeems moſt manifeſtly that the practice of admitting a perſon to be a witneſs, which has been (I dare ſay) executed for more than a century, the beginning of which is not perhaps known, can only be exerciſed by Juſtices of the Peace, it being impoſſible that it ſhould be exerciſed to any good effect by others.

It has been ſaid that the protection of the perſon to be a witneſs, will only apply to the particular crime that the party was examined to, and diſcovered.

Now, in this caſe it appears by the examination of the Priſoner, which has been read, that the only diſcovery ſhe made is relative to a bond of ſeven thouſand five hundred pounds, which was afterwards tendered to Meſſrs. Drummonds; and that ſhe has ſaid nothing with reſpect to any other forgery.

In the firſt place, let me aſk, how does this Court know that ſhe does know of any other forgery? and we muſt judge, as I have ſaid before upon the examination before us, for we cannot go out of it.

It is moſt clear, as Mr. Bearcroft has obſerved with the utmoſt candour and ability upon the ſubject, and I have known it upon experience, that if the Priſoner, who attended here to give her evidence upon the trial of the Perreaus, had been called upon and had prevaricated, or had given an account repugnant to what was contained in the examination that ſhe had been ſworn to before the Juſtices of the Peace, ſhe would have forfeited the protection ſhe was otherwiſe entitled to.

I did mention a caſe which happened before myſelf upon the Northern Circuit. I did not mention it as of weight upon that account, far from it. A man had been examined by a Juſtice of Peace, and when he came as a witneſs upon the tryal, he juſt reverſed his examination; upon which an indictment was drawn immediately againſt him for the perjury. That felony was a clergiable one, ſo that he could only be tranſported. He was tryed in an hour after for the perjury. It was proved by a witneſs that was preſent, that his evidence given in Court was directly contrary to the information before the Juſtice; the neceſſary conſequence was, that he was found guilty, and I pronounced ſentence of tranſportation upon him.

There is no doubt that if a perſon is examined upon a tryal, and gives a contrary evidence to what he gave before the Juſtice of Peace, in that caſe he has forfeited the title he would otherwiſe have to a pardon which has not actually paſſed in form, nor ever does, nor ever will, I dare ſay, in any Court whatever. He has abſolutely forfeited all title to it, and conſequently may be indicted; but here the Priſoner attended, was ready to give her evidence, and ſhe was never called upon.

Then the queſtion is, Does the right of the Priſoner to a pardon extend farther than the crime to which ſhe was examined? Now if it did appear by that examination, that ſhe had given a falſe account in her examination (for I confine myſelf to that) in ſuch caſe I ſhould think ſhe was not intitled, with reſpect to the other forgeries, to any protection; and I even doubt, whether in ſuch caſe ſhe would be intitled to protection even as to the forgery concerning which ſhe had made a full diſcovery, ſuppoſing ſhe had ſo done; becauſe, having committed perjury in one part, ſhe would obtain no credit in any other part of her evidence; but as that does not appear to be the preſent caſe, I think the implied promiſe of pardon extends to all felonies, *ejuſdem generis*, committed by the Priſoner before ſhe was admitted a witneſs.

This is not a caſe that comes literally within the Acts of Parliament which have been alluded to; yet I think it comes within the true ſpirit and meaning of them; and that thoſe Acts of Parliament have illuſtrated the true genius of the common law upon the ſubject. There are ſeveral of theſe Acts of Parliament.

The fourth and fifth of William and Mary relates to the caſe of robberies upon the highway; and it applies to the caſe of a perſon out of priſon, who ſhall make a diſcovery of other robbers upon the highway, ſo as two of them ſhall be convicted. What is his pardon to be? Not of a particular robbery, but of all robberies committed before ſuch diſcovery.

The next Act of Parliament, which is the ninth and tenth of William the Third, which relates to burglars, to breakers of houſes in the daytime, to horſe-ſtealers, and to other capital felonies therein mentioned, what ſays that Act of Parliament, what is the Encouragement that is held out there? It is, that if a perſon out of priſon ſhall make

make a diſcovery, ſo that two at leaſt ſhall be convicted, he ſhall be pardoned for all ſuch felonies as he has committed before the diſcovery.

You will be pleaſed to obſerve, that theſe two Acts confine themſelves in the pardon to felonies of the ſame kind; but when you come to the Statute of the fifth of Queen Ann, that Act goes farther; it being found, that the encouragement held forth by the former Acts was not ſufficient. By that Act, which relates to burglars and breakers of houſes in the day-time, it is enacted, That in caſe a perſon out of priſon ſhall make a diſcovery of any of theſe offences, that is, of burglaries or breaking of houſes in the day-time, he ſhall be entitled to a pardon for all felonies, except murder or treaſon, committed before that diſcovery; ſo that the third Act of Parliament goes farther, and pardons all felonies.

From the former Acts of Parliament it appears, that the party who ſhall make a diſcovery, and ſhall be produced as a witneſs, ſhall be entitled (I ſhall take notice of the abſurd condition preſently for another purpoſe) to a pardon for all felonies of the ſame kind; and from the third Act, for all felonies whatſoever, excepting ſuch flagitious crimes as murder and treaſon. The only offences, excepted by this Act, are the very heinous and enormous offences of murder and treaſon. The condition in thoſe Acts, which is in caſe two or more ſhall be convicted, bordered upon the abſurdity of the common law doctrine concerning an Approver. A man was to come to the bar; and, to take it ſtrictly, he put himſelf in the way of execution, unleſs he convicted two or more. It was impoſſible that ſuch proviſions as theſe could have any effect; and accordingly I believe I may appeal to the experience of the Officers of this Court, it is very rare that any diſcovery has been made upon any of theſe Acts of Parliament; and if there has been any, I apprehend there muſt be a lati-

tude taken by the diſcretion of the Court to ſay, that as to thoſe who have made ſuch diſcovery, though the conſequence of convicting two perſons of the ſame crimes did not follow, yet that there was a kind of honour that they ſhould remain unproſecuted.

If it be ſaid that ſhe has no pardon, that conſequently ſhe cannot plead a pardon, I ſhould be glad to know what Gentlemen would ſay when the Crown grants a warrant for a pardon. The common ordinary practice in that caſe is, that the party ſhall be bailed to plead the pardon, at the next general pardon that comes forth at the Seſſions at the Old-Bailey, or of any of the Circuits. This pardon could not be pleaded in any court of juſtice; but can it be ſaid, that becauſe you have not a mode of pleading this in legal form, that therefore execution is to be awarded? Or can it be ſaid, that if the pardon comes after the indictment and before the tryal, and that the paper ſigned by the King was exhibited as a pardon, that any court of juſtice, although it could not be pleaded, would put the party upon tryal? The Court would in that caſe certainly do, what I am ſure from recollection has been frequently done; they would give time for the party to have the pardon drawn up in form, ſo that it might be pleaded.

The diſcretion of the Court in the preſent caſe, is not, as I apprehend, a diſcretion ariſing from the feelings of Judges, but from a ſound rational diſcretion, founded upon conſtant practice and experience, inſtituted for the benefit of the public.

Upon the whole, as the ſpirit and genius of the common law is, as the caſe of the Priſoner appears to be within the reaſon of divers Acts of Parliament, as no inſtance has been produced where any perſon has been proſecuted, after having been admitted a witneſs by a Juſtice of the

the Peace, for any crime of the ſame kind with that as to which the perſon was admitted a witneſs, and as an uniform practice in the adminiſtration of the criminal juſtice of this country, ought to be obſerved with the ſtricteſt honour, and ought, in my opinion, rather to be amplified than reduced by criticiſm to any nicety, I am of opinion, that the Priſoner ought not to be tried.

Mr. Justice ASHHURST.

I Am very ſorry that I find myſelf obliged to differ from the learned Judge that has gone before me, for whoſe knowledge and abilities I have the higheſt deference and regard; but I look upon it, that this point has already received a ſolemn deciſion (upon very full and mature deliberation) in the Court of which I have the honour to be a member; for though the queſtion immediately before the Court was, whether or no the Priſoner was intitled to be bailed, yet that queſtion in my opinion neceſſarily involved in it the queſtion which is now before us, namely, the propriety of her being put upon her trial; for I can anſwer for myſelf for one, and I think I can venture to anſwer for the other Judges of the Court of King's-Bench, that had we thought that the Priſoner (under all the circumſtances appearing before us) ſtood in ſuch a light of favour as that ſhe ought not to have been put upon her trial, we ſhould have been unanimouſly of opinion that ſhe ought to be bailed; for, as has been very properly obſerved by Mr. Bearcroft, the only uſe of confinement is, that the party may be amenable to trial, and it would, in my opinion, have been a very abſurd thing in us (if we had been of opinion that ſhe ought not to be put upon her trial) to ſay that ſhe ought not to be enlarged.

I know that in the argument at the bar upon that queſtion, it was admitted by the Counſel, that the application to the Court was not upon the footing of a ſtrict legal title; and it was not contended that the Priſoner's having been admitted as an evidence (in the manner that appeared upon the affidavits at that time) would have been a ſtrict legal defence to the indictment; it was only treated

as an honorary title to favour, and I do moſt readily admit, that where an Accomplice is once admitted an evidence, and performs his part of the engagement (which is underſtood to be to make a full and fair diſcloſure of every fact in his knowledge) the implied faith on the other hand, that he ſhall have his pardon, ought to be preſerved inviolate; but at the ſame time I think that if the party does not fulfil that engagement, he has forfeited all claim to favour.

That this is not in itſelf a ſtrict legal defence, I think appears very evidently from the making of theſe two Acts of Parliament of King William and Queen Ann; for it would have been very uſeleſs and nugatory to make Acts of Parliament that a party upon giving evidence, and bringing two offenders to juſtice, ſhould be intitled to pardon, if the being admitted an evidence, and giving evidence againſt one, was of itſelf a legal title to a pardon. In the caſes that come within the compaſs of either of theſe Acts of Parliament, I look upon it to be a ſtrict legal defence, ſuch a defence as might be pleaded in bar to the indictment; but I believe ſuch a thing was never thought of, as that being admitted as an evidence could be pleaded in bar of an indictment; it therefore (in my opinion) is no more than an honorary title to favour, but ſuch a title as (if the Accomplice demeans himſelf fairly in the diſcloſure he makes) ought never to be broke through.

The practice of admitting Accomplices as witneſſes was introduced not for the ſake of the party himſelf who is ſo admitted (for it is indifferent to public juſtice whether one perſon or another falls the ſacrifice to it) but it was introduced for the ſake of the public, that ſociety may be benefited by ſuch diſcloſures as the Accomplice may be able to make, and perhaps by ſo admitting them, a greater number of offenders

offenders may be brought to juſtice; but if they would intitle themſelves to favour, they are bound to tell all they know; and it is for the benefit of the public that ſuch condition, and no other, ſhould be underſtood to be their only title to favour.

Has the Priſoner done ſo in the preſent caſe? Has ſhe made a full and a fair diſcovery of all ſhe knew? She has ſaid ſhe knew nothing but relative to the forging of that bond which was the ſubject of the indictment againſt Robert Perreau. Did ſhe know nothing elſe but that? If ſhe did not, ſhe can't be hurt by theſe indictments on which ſhe is now to be tryed; for if ſhe knew nothing of any other forgery but that, ſhe muſt neceſſarily be acquitted of forging the other bonds which are to be the ſubject matter of the preſent enquiry.

Had this queſtion been upon the bond uttered to Robert Drummond, I ſhould have been very much diſpoſed to have liſtened to what has been urged by the Counſel on the part of the priſoner. I know Mr. Drummond had a delicacy, and I think a very proper delicacy in regard to his becoming the Proſecutor againſt the Priſoner upon that bond; for though to be ſure, any thing which ſhe had ſaid at that time (under the promiſes that were made to her) could not have been legal or admiſſible evidence upon an indictment to be preferred againſt her for the forgery of that bond; yet what has been ſaid with regard to that affair upon the tryal of Robert Perreau, has got out into the world, and may have had its effect; and therefore, had the queſtion been only upon the bond on which Robert Perreau has been tryed, I ſhould readily have concurred that ſhe ought not to be put upon her tryal.

But as to the bond of Sir Thomas Frankland, that does not fall within the ſame reaſoning; and as ſhe ſaid ſhe knew nothing of that

bond (if ſhe did know any thing of it) as I ſaid before, ſhe certainly has not diſcloſed all ſhe knew upon the ſubject relative to theſe Perreaus; and if ſhe has not, I think ſhe does not ſtand in ſuch a light of favour as ought to prevent her being put upon her tryal.

But though that is my full and firm opinion, yet, when the learned Judge at the head of this commiſſion, for whoſe opinion I have ſo high a deference and regard, has expreſſed his opinion, that ſhe ought not, and cannot legally be put upon her tryal, I ſhould be very ſorry that from my own opinion her tryal ſhould now be hurried on, till there has been time to take the opinion of the reſt of the Judges; therefore I am deſirous that her tryal ſhould be poſtponed, and that the opinions of all the Judges may be taken upon the ſubject.

Mr. Baron HOTHAM.

I Have liſtened with great attention to all that has been urged by the Counſel on both ſides, and with the utmoſt deference to what has fallen from my brothers. I have the misfortune, and I feel it to be ſuch, that I am to ſpeak third, and therefore my voice muſt decide as to this moment, upon which ſide this queſtion is to be determined; and I feel it the rather a misfortune, becauſe I cannot ſatisfy my conſcience that whatever may be the wiſh of humanity, that in point of law I am intitled to ſay that the Priſoner ought not to be tryed.

In the firſt place, I cannot conſider this as ſtanding upon the ancient doctrine of Approvers.

In the next place, I cannot conſider it as ſtanding upon the Acts of Parliament; but I conſider it as reſting merely upon that diſcretion, that honour, and that juſtice, which will always make the law of the land, though it is not to be found in any book.

Now upon that footing my opinion is this, that the Priſoner's being examined before a Juſtice of the Peace, or being examined in this Court, makes no ſort of difference. I entirely agree with my brother Gould, that if the examination before the Juſtice be ſuch an examination, as had it been taken in Court, would have intitled her to this protection, I, for one, would give it her, though it was not received in Court; but then I cannot ſatisfy myſelf that that protection is to be given her, or that ſhe has a claim to it, *ex debito juſtitiæ*, unleſs ſhe ſhews herſelf to have been intitled to it by a full, a fair, and a true

confeſſion;

confeſſion; for if it is not a *full* and a *fair* confeſſion, I ſay, *quoad* the purpoſes of juſtice, it is not a *true* confeſſion.

I therefore think, that however Courts of Juſtice are bound in honour to give this protection to Accomplices, that honour ought to be reciprocal; and if it is not found upon the one hand in the Accomplice, that Accomplice has no right to expect favour on the other.

If the Priſoner had now been brought to tryal for the forgery of which Perreau was convicted, and upon which ſhe gave her evidence, I have no ſcruple to ſay that I ſhould have been firmly of opinion that ſhe gave ſufficient evidence *quoad* that before the Juſtices, though ſhe was not called upon here, to intitle her not to be proceeded againſt; but when a priſoner is admitted an evidence by Juſtices of the Peace, under the aſſurance of diſcloſing all ſhe knows with regard to the Priſoner, upon whoſe account ſhe is brought before the Juſtices, I have no conception that if ſhe ſink many material facts, or indeed, if ſhe ſink one material fact againſt the Priſoner, though it be not relative to the indictment, or the offence immediately before them, I have no conception that that is ſuch a merit as to be an eternal bar againſt any indictment being preferred againſt herſelf.

I don't therefore ſee the Priſoner in the light of having made that full and fair and true diſcloſure, that, had ſhe made it, would have intitled her to this protection; and therefore my opinion is, that this tryal ought to be proceeded upon. But I am delivered from very great uneaſineſs by what fell from my brother Aſhhurſt, with whom I moſt heartily concur in deſiring that the opinion of the reſt of the Judges may be taken before this trial is proceeded upon. I do it to ſatisfy my own feelings, but I do it more out of the reſpect I bear to the learning of my brother Gould.

F I N I S.

Trials at Law, and Arguments of Counsel,

Accurately taken in SHORT-HAND,

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